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January 26, 2017

Mark Neary, Clerk
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625-0962

CORRECTED LETTER

Re: In the Matter of Christopher M. Manganello
Docket No. DRB 16-382
District Docket No. IV-2015-0054E

Dear Mr. Neary:

The Disciplinary Review Board reviewed the motion for discipline by consent (censure or such lesser discipline as the Board deems appropriate) filed by the District IV Ethics Committee (DEC), pursuant to R. 1:20-10(b). Following a review of the record, the Board determined to grant the motion. In the Board's view, a censure is the appropriate discipline for respondent's violations of RPC 1.3 (lack of diligence), RPC 1.4(c) (failure to explain the matter to allow the client to make informed decisions about the representation), RPC 1.5(b) (failure to memorialize the rate or basis of the fee), RPC 1.16(d) (failure to return the client's file), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The Board, however, determined to dismiss the stipulated violation of RPC 3.2 (failure to expedite litigation).

This matter was previously before the Board as a motion for discipline by consent (reprimand), which the Board denied on May 27, 2015. The Board suggested that the parties file a motion for

January 26, 2017

Page 2 of 8

censure by consent, including as a condition a full refund of the fee that the grievant had paid respondent. The latest motion documents indicate that respondent has fully refunded the fee to the grievant.

Specifically, on November 7, 2012, grievant, Shirley Kuzmunich, who resides in California, paid respondent \$3,500 to locate and exhume the grave of her son, who had died shortly after birth thirty years earlier. Although respondent had not previously represented her, he did not provide grievant with a writing setting forth the basis or rate of his fee or the scope of the representation.

At the time, Kuzmunich expressed a deep gratitude for respondent's having taken on her matter. She explained that she "had a tortured soul over this for many years" and that she looked forward to closure. Kuzmunich suspected that medical personnel had lied to her concerning the circumstances of her son's birth, causing her to question whether her son was still alive.

Respondent assured Kuzmunich that he was "on the case" and that the exhumation process should take "a few months," including the time needed to seek a court order for permission to do so. As seen below, after eleven months of representation, however, the exhumation still had not taken place and respondent had not filed any documents with the court seeking such permission.

On November 21, 2012, Kuzmunich sent respondent an e-mail asking whether he had obtained medical records for her son. Although respondent replied in the affirmative, his files did not contain an executed HIPAA form from Kuzmunich or other documents typically required when requesting medical records. On December 21, 2012, respondent informed Kuzmunich that a verified complaint and order to show cause for exhumation would be filed "right after the Court's Holiday recess." Neither pleading was ever filed.

Six months later, on July 18, 2013, Kuzmunich sent respondent an e-mail inquiring about the cost of disinterment and a DNA test. The next day, respondent replied that he "[hasn't] former [sic] up a specific fee, but it should not be very expensive at all" and that "[t]he DNA cost is in the hundreds of dollars." She also asked whether she should contact a registry of adoptees in case her son was alive and looking for her. On August 6, 2013, respondent e-mailed Kuzmunich, stating that he was scheduling the exhumation for the week of September 1, 2013; that he was in the process of ensuring that the documents needed by the cemetery were

in order; that he would be contacting the cemetery that week to finalize the scheduling; and that, "it can't hurt to contact the registry" for adoptees. On August 26, 2013, Kuzmunich sent an e-mail to respondent requesting the exact day of the week that the exhumation would take place, because she needed to book a flight from California to New Jersey. The exhumation was never scheduled.

Subsequently, because she had not heard from respondent in some time, and had become frustrated with the progress of the matter, Kuzmunich performed her own investigation. She discovered that early on, a cemetery representative had informed respondent that DNA testing cannot be performed on newborns because their bones do not calcify, an opinion that a local forensic expert contacted by Kuzmunich later confirmed. She also learned that the cost to initiate the exhumation was \$1,300. Kuzmunich reminded respondent that he had also told her he could get the cemetery to "do it" for free (presumably, the exhumation). In addition, Kuzmunich learned that the cost of the DNA testing would exceed \$1,000, much more than the hundreds of dollars respondent had predicted.

Hence, on October 1, 2013, Kuzmunich terminated respondent's representation, via e-mail, stating that, "[i]f I knew the truth of these added cost [sic] I would not have told you I would be able to afford this." Kuzmunich closed her e-mail by demanding a full refund of her retainer, and lamenting that her heart was broken and that all hope was lost.

In reply, respondent disputed Kuzmunich's account of events and advised her not to give up on the exhumation of the body because "we are right at the finish line." He added, however, that if she chose to terminate the matter, he would take no further action and would prepare a "final accounting." In reply to Kuzmunich's subsequent e-mails, respondent asserted that he would not refund any of the money she had paid to him as a flat fee simply because she had changed her mind about pursuing the matter. He claimed that he had worked on the matter diligently, that he had made no misrepresentations, that he was insulted by her false accusations, and that he would send her file to her the following Monday.

Respondent's file includes no document establishing that a copy of the file or any documentation was mailed to Kuzmunich. He refunded Kuzmunich her fee only recently, more than three years after she terminated the representation.

The facts establish that respondent agreed to represent Kuzmunich to facilitate the exhumation and DNA testing of her son, who had presumably died decades earlier, shortly after his birth. Yet, more than one year after Kuzmunich paid respondent a \$3,500 flat fee, neither of those two benchmarks had been met. In failing to achieve these discrete tasks, especially in the absence of an explanation for these failures, respondent violated RPC 1.3.

Further, respondent failed to explain the matter to the extent necessary to permit Kuzmunich to make informed decisions regarding the representation, a violation of RPC 1.4(c). Respondent told Kuzmunich that the exhumation would not be very expensive; he severely underestimated the cost of the DNA testing; and he failed to inform Kuzmunich that the DNA test likely would not be possible. After researching these issues herself, Kuzmunich told respondent that, had she known the true costs, she would have informed him that she could not afford them.

Additionally, respondent accepted a \$3,500 fee from Kuzmunich without providing to her, in writing, the rate or basis of that fee, a violation of RPC 1.5(b). In fact, this omission led to confusion later in the representation, when Kuzmunich expressed her understanding that the fee would cover "everything," only to learn that she was expected to pay additional monies toward the exhumation and DNA testing.

Respondent also violated RPC 1.16(d). After terminating the representation, Kuzmunich repeatedly asked respondent to send to her the records and information related to her case. At one point, respondent assured her that he would send her file the following Monday. He never did.

Finally, respondent made several misrepresentations to Kuzmunich over the course of the representation, a violation of RPC 8.4(c). He assured her that he had requested her son's medical records and that he was scheduling the exhumation for the week of September 1, 2013. Moreover, as Kuzmunich was terminating the representation, foremost in her mind was the fact that more than a year had passed since she paid respondent, and, despite his continued promises that the matter was progressing, it was quite evident that he had done little to no work on her behalf. Knowing this, respondent egregiously tried to convince Kuzmunich to allow him to continue on the case, telling her that, "[w]e are right at the finish line," yet another misrepresentation.

As noted, however, respondent did not violate RPC 3.2 (failure to advance litigation in a timely manner), because there was no litigation. Typically, this charge is reserved for those attorneys who attempt to impede the progress of matters already on the court's docket. That is not the case here. That being said, respondent is guilty of all of the other charged violations and is deserving of significant discipline.

Typically, a misrepresentation to a client requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). At times, a reprimand may be imposed, even if the misrepresentation is accompanied by other ethics infractions, including lack of diligence and failure to communicate, both of which are also present here. See, e.g., In re Ruffolo, 220 N.J. 353 (2015) (attorney misrepresented that the client's matter was proceeding apace and that he should expect a monetary award in the near future, when the attorney knew that the complaint had been dismissed, thereby violating RPC 8.4(c); the attorney also exhibited gross neglect and a lack of diligence by allowing his client's case to be dismissed, not working on it after filing the initial claim, and failing to take any steps to prevent its dismissal or ensure its reinstatement thereafter, violations of RPC 1.1(a) and RPC 1.3; in addition, the attorney violated RPC 1.4(b) by failing to promptly reply to the client's requests for status updates); In re Falkenstein, 220 N.J. 110 (2014) (attorney failed to inform the client that he had not complied with the client's request to seek post-judgment relief, choosing instead to lead the client to believe that he had filed an appeal and concocting false stories to support his lies, a violation of RPC 8.4(c); the attorney's failure to seek post-judgment relief violated RPC 1.1(a) and RPC 1.3; because he did not believe the appeal had merit, the attorney's failure to withdraw from the case was a violation of RPC 1.16(b)(4); the attorney also practiced law while ineligible, although not knowingly, a violation of RPC 5.5(a)); and In re Braverman, 220 N.J. 25 (2014) (attorney failed to tell his client that the complaints filed on her behalf in two personal injury actions had been dismissed, thereby misleading her, by his silence, into believing that both cases remained pending, a violation of RPC 8.4(c); the attorney also violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, and RPC 8.1(b); the Board found that the attorney's unblemished thirty-four years at the bar was outweighed by his inaction, which left the client with no legal recourse).

Additionally, respondent was guilty of failing to set forth, in writing, the basis or rate of his fee and of failing to return Kuzmunich's file, violations of RPC 1.5(b) and RPC 1.16(d). Even when combined with other ethics infractions, these additional elements typically result in an admonition and would not necessarily change the appropriate sanction here. See e.g., In the Matter of Alan D. Krauss, DRB 02-041 (May 23, 2002) (admonition for attorney who failed to prepare a written retainer agreement, grossly neglected a matter, lacked diligence in the representation of the client's interests, and failed to communicate with the client; violations of RPC 1.5(c), RPC 1.1(a), RPC 1.3, and RPC 1.4(a), respectively) and In re Carroll, Docket No. 95-017 (DRB January 30, 1995) (admonition for lack of diligence, failure to communicate with the client, failure to return client file, and failure to cooperate with ethics authorities).

In mitigation, the Board considered respondent's willingness to admit his wrongdoing; his agreeing to the motion for discipline by consent, thereby saving disciplinary resources; and his unblemished career of sixteen years at the bar. These factors, however, are outweighed by the aggravating factors present in this record, which justify an enhancement to the otherwise appropriate quantum of discipline.

As stated earlier, respondent lied to Kuzmunich when he told her that they were close to "the finish line". Given the totality of her life experiences and what she was attempting to accomplish by hiring respondent, the magnitude of that lie comes into sharp focus.

At the time of the representation, Kuzmunich was sixty-one years old. The purpose of the retention was to exhume the remains of her son, who apparently had died in the hospital shortly after being born prematurely about thirty years earlier. A review of her e-mails to respondent make it clear that Kuzmunich had lived for decades, tortured by doubts as to whether her son actually had died.

In reading the record, one gets heart-wrenching insights into the past from her description of the minutes and hours immediately following the delivery of her son. In her mind, after all these years, she still had profound doubts about whether her baby died or whether there was anything wrong with him. So great was her concern that she even asked respondent whether it would be worth her effort

January 26, 2017

Page 7 of 8

to check an online registry for adopted children in case her son were alive after all these years and looking for her.

Respondent was aware of all of these factors. Kuzmunich looked at him as a hero, thanking him for understanding her need to know the truth, her tortured soul seeking closure, and her plea for help. She thanked him for his kind heart and his understanding. The gratitude, however, was misplaced.

The vulnerability of grievant should have been enough to cause respondent to tread lightly. Instead, he made matters worse by bringing her to the brink of an imaginary resolution and then left her at the edge for more than a year. Ultimately, when Kuzmunich discovered his neglect and dishonesty, he adds insult to injury by lying to her that "the finish line" is so close. All the while, he knows he never even started the race. Moreover, respondent neither provided an explanation for his inaction nor showed remorse.

Based on the vulnerability of the client, the sensitive nature of the representation, and the economic harm to the client, depriving her of \$3,500 for several years, the Board determined that respondent receive a censure.

Enclosed are the following documents:

1. Notice of motion for discipline by consent, dated November 3, 2016.
2. Stipulation of discipline by consent, dated September 10, 2016.
3. Affidavit of consent, dated September 25, 2016.
4. Ethics history, dated January 23, 2017.

Very truly yours,



Ellen A. Brodsky
Chief Counsel

EAB/alc

c: See attached list

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